
**STUDENT RIGHTS UP IN SMOKE:
THE SUPREME COURT'S CLOUDED JUDGMENT IN *MORSE*
V. *FREDERICK***

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*In recent years, the rights of public school students have dwindled, primarily in the areas of Fourth Amendment search and seizure, and First Amendment freedom of speech. This is due, in large part, to the conservative trend the Supreme Court has taken and the scary times in which we live, fraught with incidents of threats on school campuses, school shootings, and other violent acts. The end result is that public school students, within the schoolhouse gates, are stripped of rights once deemed sacrosanct to the Founders of this Nation. The Supreme Court's rationale for the circumscription of student rights is to protect the students and is grounded in the doctrine of *parens patriae*. Although the Supreme Court's objective has been accomplished, we must ask ourselves at what cost? Students in public schools are now required to pass through metal detectors and are subjected to random locker searches and drug tests. Student no longer possess the right to freedom of speech; and schools, once regarded as the "marketplace of ideas," have now become "enclaves of totalitarianism." It seems as though the school system has become increasingly similar to the prison system. This Article suggests the Supreme Court's objectives can be accomplished in a less restrictive manner while still keeping the safety of our children paramount. The Article will provide a history of student speech jurisprudence in order to further analyze these recent decisions and trends. This Article will also provide a thorough, in-depth analysis of *Morse v. Frederick*, a recent Supreme Court decision curtailing pub-*

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lic school student's First Amendment rights. This Article will attempt to exemplify how the Supreme Court has detracted from its prior "speech protective" decisions and show how the Court is adopting instead, deferential standards that grant school authorities unbridled authority to censor speech. Additionally, this Article will address just how far school authorities' disciplinary power should extend off-campus. With the advent of the Internet and many social utility websites such as America Online, MySpace, and Facebook many students have been disciplined for their online activities. This Article predicts that the dicta and holding of Morse v. Frederick will be used by courts, not only to censor speech that can reasonably be regarded as encouraging illegal drug use, but also to censor speech occurring off-campus, including speech posted on these social utility websites.

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INTRODUCTION

Generally, this Article will provide a current overview of public school students' First Amendment rights, and demonstrate that the prevailing standards for evaluating them are inadequate. It will discuss how the Supreme Court has effectively limited the application of *Tinker v. Des Moines Independent Community School District*¹ through the exceptions created in *Bethel School District No. 403 v. Fraser*,² *Hazelwood School District v. Kuhlmeier*³ and *Morse v. Frederick*.⁴ Specifically, this Article will focus on the Supreme Court's recent decision in *Morse*, which illustrates the Court's curtailment of student speech.

Part I of this Article will summarize the history and evolution of the Supreme Court's decisions involving students' First Amendment rights. Part II will provide a synopsis of the Supreme Court's recent decision in *Morse*. Part III will discuss the problems with First Amendment jurisprudence as it applies to students and demonstrate the Court has adopted deferential standards that offer students little or no protection. Additionally, it will show that *Tinker* has become the

¹ 393 U.S. 503 (1969).

² 478 U.S. 675 (1986).

³ 484 U.S. 260 (1988).

⁴ 127 S. Ct. 2618 (2007).

exception instead of the rule to be applied in student speech cases.⁵ Moreover, it will establish that the standard enunciated in *Tinker* is well suited to evaluate all student speech cases, and the Supreme Court's decisions following *Tinker* are unnecessary additions to First Amendment case law. Part IV will scrutinize the dangers of the Supreme Court's decision in *Morse v. Frederick* and the various ways in which lower courts may erroneously interpret the decision. Lastly, Part V will propose a remedy the courts could implement to avoid discrepant and incongruent decisions.

It is important to note the purpose of this Article is not to argue that public schools should be prohibited from suppressing speech that encourages illegal drug use. Schools should have the authority to censor speech causing a material and substantial disruption;⁶ speech that is lewd, vulgar and indecent;⁷ speech that "bear[s] the imprimatur of the school;"⁸ and speech that condones or sanctions illegal drug use.⁹ However, this authority cannot be boundless and must be constricted in order to prevent the First Amendment from "exist[ing] in principle but not in fact."¹⁰ *Morse's* consistency with the Supreme Court's two prior student speech cases, *Fraser* and *Kuhlmeier*, evinces that the Court has no stopping point, and is poised to further circumscribe the few remaining rights students possess.¹¹ *Tinker*

⁵ See *id.* at 2634 (Thomas, J., concurring) ("[T]he Court has . . . scaled back *Tinker's* standard, or rather set the standard aside on an ad hoc basis.").

⁶ See *Tinker*, 393 U.S. at 509.

⁷ See *Fraser*, 478 U.S. at 685.

⁸ See *Kuhlmeier*, 484 U.S. at 271.

⁹ See *Morse*, 127 S. Ct. at 2622.

¹⁰ *Tinker*, 393 U.S. at 513.

¹¹ See *Morse*, 127 S. Ct. at 2629-37 (Thomas, J., concurring) ("As originally understood,

enunciated the standard to be used when evaluating student rights, yet, in subsequent decisions the Court has consistently detracted from its holding.¹² Furthermore, while *Morse* may appear as a narrow exception to the holding of *Tinker*, it has broad implications.¹³

I. HISTORY OF STUDENT CONSTITUTIONAL RIGHTS

The First Amendment provides, in pertinent part, that “Congress shall make no law . . . abridging the freedom of speech.”¹⁴ Despite this constitutional mandate, the current status of freedom of speech within the public school system is cause for much concern. Student speech is surreptitiously being curtailed through the adoption of deferential standards ill equipped to evaluate fundamental rights. This trend is exemplified by the gradual erosion of the overarching, “speech protective” standard established in *Tinker*, through the creation of several amorphous exceptions which emanated from the Supreme Court’s subsequent decisions.¹⁵

A. *Tinker v. Des Moines Independent Community School District*

Tinker, decided in 1969, was the first of a trilogy of cases that would comprise the standard for evaluating students’ freedom of

the Constitution does not afford students a right to free speech in public schools.”).

¹² *Id.* at 2634. *See id.* at 2622, 2629, *Kuhlmeier*, 484 U.S. at 273, and *Fraser*, 478 U.S. at 685, for exceptions to the standard articulated in *Tinker*.

¹³ *See* Erwin Chemerinsky, *Turning Sharply to the Right*, 10 GREEN BAG 2d 423, 430 (2007) (“Although the Court’s holding was narrow, the decision’s implications are broad, and indicate greater judicial deference to schools when they want to suppress student speech.”).

¹⁴ U.S. CONST. amend. I.

¹⁵ *See* Erwin Chemerinsky, *Students Do Leave Their First Amendment Rights At The Schoolhouse Gates: What’s Left of Tinker?*, 48 DRAKE L. REV. 527, 530 (2000) (referring to the majority opinion in *Tinker* as the “speech protective model”).

speech rights in a school setting.¹⁶ The Court in *Tinker* addressed whether the suspension of several students, who silently protested the Vietnam War by wearing black armbands to school in contravention of the school's policy, violated their First Amendment rights.¹⁷ Grappling with the issue, the Court observed the distinct nature of the school environment, but declared that both students and teachers retain their First Amendment rights.¹⁸ Examining precedent, the Court made the most oft-quoted and renowned pronouncement in student speech cases stating, "[i]t can hardly be argued that either students or teachers shed their constitutional rights to freedom of speech or expression at the schoolhouse gate."¹⁹ In support of this position the Court affirmed, "[t]his has been the unmistakable holding of this Court for almost 50 years."²⁰

In reaching this decision, the Court took note of the delicate balance that must be maintained in the school environment by describing the tension that exists between adhering to the rights embodied in the First Amendment and sustaining the authority of school officials.²¹ The Court opined that the silent, passive, political speech at issue was analogous to pure speech, and therefore entitled to the ut-

¹⁶ *Tinker*, 393 U.S. at 509 (holding students retain First Amendment rights while on school premises unless such speech causes significant interference with "the operation of the school").

¹⁷ *Id.* at 504-05.

¹⁸ *Id.* at 506 ("First Amendment rights, applied in light of the special characteristics of the school environment, are available to teachers and students.").

¹⁹ *Id.*

²⁰ *Id.*

²¹ *See Tinker*, 393 U.S. at 507 ("Our problem lies in the area where students in the exercise of First Amendment rights collide with the rules of the school authorities.").

most protection.²² Furthermore, the prohibited speech did not cause interference with the work of the school or infringe upon the rights of others.²³ Despite the district court's ruling—that the action taken by school officials was reasonable due to trepidation that the armbands would cause a disruption—the Supreme Court found in favor of the students and reversed the holding of the lower court stating, “undifferentiated fear or apprehension of disturbance is not enough to overcome the right to freedom of expression.”²⁴ The Court focused on the fact that any deviation from the norm has the potential to instill fear.²⁵ Because the record was devoid of any evidence which would lead school officials to believe the armbands had the capability of causing a disruption, the Court held that “where there is no finding and no showing that engaging in the forbidden conduct would ‘materially and substantially interfere with the requirements of appropriate discipline in the operation of the school,’ the prohibition cannot be sustained.”²⁶

B. *Bethel School District No. 403 v. Fraser*

In 1986, the Supreme Court's decision in *Fraser* marked the beginning of the retreat from the holding of *Tinker* by creating the first exception.²⁷ In *Fraser*, a student was suspended and barred from speaking at the school's commencement ceremony because he deliv-

²² *Id.* at 508.

²³ *Id.*

²⁴ *Id.*

²⁵ *Id.*

²⁶ *Tinker*, 393 U.S. at 509 (quoting *Burnside v. Byars*, 363 F.2d 744, 749 (5th Cir. 1966)).

²⁷ *Fraser*, 478 U.S. at 685-86 (holding the First Amendment does not protect speech that is obscene, vulgar, lewd, or indecent when disseminated on school premises).

ered a sexually-suggestive speech nominating a classmate for a position on the student government.²⁸ Consequently, the student filed suit seeking an injunction and monetary damages asserting his First Amendment rights had been violated.²⁹ The district court held in favor of the student and the appellate court affirmed.³⁰ The Supreme Court granted certiorari to determine “whether the First Amendment prevents a school district from disciplining a high school student for giving a lewd speech at a school assembly.”³¹ The Court deferred to the authority of school officials and proclaimed that “[t]he determination of what manner of speech . . . is inappropriate properly rests with the school board.”³² Reversing the lower courts, the Supreme Court abandoned *Tinker’s* substantial disruption test and held that censoring the student’s sexually insinuating speech did not contravene the First Amendment.³³ In reaching this result, the Court explained, “constitutional rights of students in public school are not automatically coex-

²⁸ *Id.* at 677-79. *See also id.* at 687 (Brennan, J., concurring):

I know a man who is firm—he’s firm in his pants, he’s firm in his shirt, his character is firm—but most . . . of all, his belief in you, the students of Bethel, is firm. Jeff Kuhlman is a man who takes his point and pounds it in. If necessary, he’ll take an issue and nail it to the wall. He doesn’t attack things in spurts—he drives hard, pushing and pushing until finally—he succeeds. Jeff is a man who will go to the very end—even the climax, for each and every one of you. So vote for Jeff for A.S.B. vice-president—he’ll never come between you and the best our high school can be.

(internal quotations omitted).

²⁹ *Id.* at 679.

³⁰ *Id.*

³¹ *Id.* at 677.

³² *Fraser*, 478 U.S. at 683.

³³ *Id.* at 685 (“We hold that petitioner School District acted entirely within its permissible authority in imposing sanctions upon Fraser in response to his offensively lewd and indecent speech.”).

tensive with the rights of adults in other settings.”³⁴ Additionally, by declining to apply the standard enunciated in *Tinker*, the Court implicitly found *Tinker’s* application to be wanting in certain situations. It reasoned that the school districts need to be given wide latitude to discipline students in numerous unforeseeable situations.³⁵

C. *Hazelwood School District v. Kuhlmeier*

The second exception to *Tinker* emerged in *Kuhlmeier*, decided less than two years after *Fraser*, in 1988.³⁶ In *Kuhlmeier*, former student staff members of the school newspaper filed suit against the school and several school officials alleging their constitutional rights were infringed when the principal edited two pages from their school-sponsored newspaper.³⁷ The newspaper was funded by the Board of Education, but the costs were offset by revenue generated from the newspaper sales.³⁸ The principal removed segments of the article due to what he perceived to be inappropriate subject matter, and concern for the well-being of the students referred to in the article.³⁹ The district court held in favor of the school officials, conclud-

³⁴ *Id.* at 682 (citing *New Jersey v. T.L.O.*, 469 U.S. 325, 340-42 (1985)).

³⁵ *Id.* at 686. *See also Morse*, 127 S. Ct. at 2627 (“*Fraser* established that the mode of analysis set forth in *Tinker* is not absolute.”).

³⁶ *Kuhlmeier*, 484 U.S. at 273 (holding the First Amendment does not protect speech that may reasonably be perceived as school-sponsored).

³⁷ *Id.* at 262.

³⁸ *Id.* at 262-63.

³⁹ *Id.* at 263-64. One of the articles focused on teen pregnancy, sex, and the use of birth control while the other discussed the topic of divorce. *Id.* at 263. Although the article on teen pregnancy did not refer to the students within the school by their real names, the principal was concerned that due to limited number pregnant students, the subjects of the article would be easily identifiable. *Id.* The principal was apprehensive about the divorce article because the parents who were the focus of the article were not given a chance to rebut the comments made by the student regarding their divorce. *Id.*

ing that a school newspaper is “an integral part of the school’s educational function,” and the circumscription of student speech within that medium is proper, provided it is motivated by “a substantial and reasonable basis.”⁴⁰ Reversing the decision of the district court, the court of appeals held the school newspaper constituted a public forum, and speech within it could only be suppressed when “necessary to avoid material and substantial interference with school work or discipline . . . or the rights of others.”⁴¹ The Supreme Court granted certiorari to address “whether the First Amendment requires a school affirmatively to promote particular student speech.”⁴² Reversing the findings of the court of appeals, the Supreme Court adhered to the deferential standard set forth in *Fraser*.⁴³ The Court stated, “[a] school need not tolerate student speech that is inconsistent with its ‘basic educational mission.’”⁴⁴ Finding the school officials never intended the newspaper to be a public forum, the Court concluded it was subject to regulation by school officials.⁴⁵ The Court distinguished the speech at issue in *Tinker* from school-sponsored speech, and reasoned that school officials should be given more latitude to censor speech “the public might reasonably perceive to bear the im-

⁴⁰ *Kuhlmeier v. Hazelwood Sch. Dist.*, 607 F. Supp. 1450, 1463 (E.D. Mo. 1985) (quoting *Frasca v. Andrews*, 463 F. Supp. 1043, 1052 (E.D.N.Y. 1979)).

⁴¹ *Kuhlmeier*, 484 U.S. at 265 (quoting *Tinker*, 393 U.S. at 511).

⁴² *Id.* at 266, 270-71.

⁴³ *Id.* at 266-67 (“We thus recognized that ‘[t]he determination of what manner of speech in the classroom or in school assembly is inappropriate properly rests with the school board,’ rather than with the federal courts.”). The Court continued by adding, “[t]his [deferential] standard is consistent with our oft-expressed view that the education of the Nation’s youth is primarily the responsibility of parents, teachers, and state and local school officials, and not of federal judges.” *Id.* at 273.

⁴⁴ *Id.* at 266 (quoting *Fraser*, 478 U.S. at 685).

⁴⁵ *Id.* at 270 (“It is this standard, rather than our decision in *Tinker*, that governs this case.”).

primatur of the school.”⁴⁶ The Court held that “educators do not offend the First Amendment by exercising editorial control over the style and content of student speech in school-sponsored expressive activities so long as their actions are reasonably related to legitimate pedagogical concerns.”⁴⁷

II. THE SUPREME COURT’S RECENT DECISION

A. *Morse v. Frederick*

In 2007, the Supreme Court decided *Morse*, its fourth case dealing with students’ First Amendment rights. The Court held “schools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use.”⁴⁸

In *Morse*, a student was suspended by his principal for displaying a banner that read “BONG HiTS 4 JESUS” at an Olympic Torch Relay in Juneau, Alaska.⁴⁹ The student, Frederick, proceeded to challenge the suspension administratively.⁵⁰ However, the superintendent of the school district upheld Frederick’s suspension, and concluded he was not suspended because the school disagreed with the message conveyed on his banner, but rather because the speech advocated the use of illicit substances.⁵¹ Subsequently, Frederick filed suit in district court claiming the principal and the school board

⁴⁶ *Kuhlmeier*, 484 U.S. at 270-71.

⁴⁷ *Id.* at 273.

⁴⁸ *Morse*, 127 S. Ct. at 2622.

⁴⁹ *Id.* at 2622.

⁵⁰ *Id.* at 2623.

⁵¹ *Id.*

infringed upon his First Amendment rights.⁵² The district court ruled in favor of Principal Morse and the school board finding that Principal Morse's interpretation of the banner—that it advocated the use of illegal drugs—was reasonable and imposed upon her a duty to prevent the message from being disseminated at a school-sanctioned event.⁵³ Reversing the decision of the district court, the Ninth Circuit utilized the standard implemented in *Tinker*, and held Frederick's First Amendment rights had been abridged because the school disciplined him despite being unable to show his speech was likely to cause a substantial disruption.⁵⁴ The Ninth Circuit also opined that Principal Morse was not entitled to receive qualified immunity because "Frederick's right to display his banner was so 'clearly established' that a reasonable principal in Morse's position would have understood that her actions were unconstitutional."⁵⁵ The Supreme Court granted certiorari to determine whether Frederick's First Amendment rights were violated when Principal Morse confiscated his banner and if so, whether Principal Morse should receive qualified immunity for her actions.⁵⁶

The Court began its analysis by confirming this was a student speech case, thereby rendering any precedent outside the realm of student speech inapplicable.⁵⁷ The Court concluded that it was a

⁵² *Id.*

⁵³ *Morse*, 127 S. Ct. at 2623.

⁵⁴ *Frederick v. Morse*, 439 F.3d 1114, 1118, 1123 (9th Cir. 2006).

⁵⁵ *Morse*, 127 S. Ct. at 2623-24 (quoting *Frederick*, 439 F.3d. at 1123-25).

⁵⁶ *Id.* at 2624.

⁵⁷ *Id.* This determination is of the utmost significance because if the Court had not labeled the event as being school-sanctioned, Frederick would be viewed as an adult, since he was eighteen years of age, exercising his right to free speech in a public forum, thereby entitling him to the utmost protection under the First Amendment. This case would then fall outside

school-sanctioned event due to the fact that the Olympic Torch Relay took place directly across the street from the school, was supervised by faculty members, and was attended by the school band and cheerleaders.⁵⁸ The Court stated that “[u]nder these circumstances, we agree with the superintendent that Frederick cannot ‘stand in the midst of his fellow students, during school hours, at a school-sanctioned activity and claim he is not at school.’ ”⁵⁹

In determining whether the message displayed on Frederick’s banner advocated illegal conduct or was merely an innocuous statement, the Supreme Court conceded that the meaning of Frederick’s banner was elusive.⁶⁰ However, the Court deferred to and, in fact, supported Principal Morse’s interpretation of the banner.⁶¹ The Court stated:

At least two interpretations of the words on the banner demonstrate that the sign advocated the use of illegal drugs. First, the phrase could be interpreted as an imperative: “[Take] bong hits . . .”—a message equivalent, as Morse explained in her declaration, to “smoke marijuana” or “use an illegal drug.” Alternatively, the phrase could be viewed as celebrating drug use—“bong hits [are a good thing],” or “[we take] bong hits”—and we discern no meaningful distinction between celebrating illegal drug use in the midst of fellow students and outright advocacy or promotion.⁶²

the realm of student-speech precedents altogether, instead being governed by First Amendment law as it pertains to adults under which Frederick’s rights would undoubtedly have been violated.

⁵⁸ *Id.*

⁵⁹ *Id.*

⁶⁰ *Morse*, 127 S. Ct. at 2624.

⁶¹ *Id.* at 2625 (“We agree with Morse.”).

⁶² *Id.*

After concluding the most plausible meaning of Frederick's banner was to sanction illegal drug use, the Court proceeded to analyze Frederick's banner under the rubric of prior student speech cases, only to find that none were suitable to dispose of the issue.⁶³ Addressing *Fraser's* relevance, the Court acknowledged the standard utilized in that case was somewhat nebulous.⁶⁴ Despite this lack of clarity, the Court affirmed that *Fraser* stood for two principles: (1) "the constitutional rights of students in public school are not automatically coextensive with the rights of adults in other settings,"⁶⁵ and (2) "the mode of analysis set forth in *Tinker* is not absolute."⁶⁶ However, the Court was reluctant to adopt the school board's argument—to extend the holding of *Fraser* to encompass speech that offends or contravenes the school's mission—because this analysis "stretches *Fraser* too far."⁶⁷ The Court also ruled out *Kuhlmeier*, stating it was inapposite "because no one would reasonably believe that Frederick's banner bore the school's imprimatur."⁶⁸ The Court then strayed from a First Amendment analysis altogether, circumventing *Tinker's* application by focusing on the severe impact drugs have on our Nation's youth.⁶⁹ Relying upon principles derived from

⁶³ *Id.* at 2625-29.

⁶⁴ *Id.* at 2626.

⁶⁵ *Morse*, 127 S. Ct. at 2626 (quoting *Fraser*, 478 U.S. at 682).

⁶⁶ *Id.* at 2627.

⁶⁷ *Id.* at 2629.

⁶⁸ *Id.* at 2627. *But see* Murad Hussain, Commentary, *The "Bong" Show: Viewing Frederick's Publicity Stunt Through Kuhlmeier's Lens*, 116 YALE L.J. 292 (Supp. 2007) (suggesting the Court in *Morse* could have suppressed Frederick's speech under the standard enunciated in *Kuhlmeier*).

⁶⁹ *Morse*, 127 S. Ct. at 2627-29 ("Tinker warned that schools may not prohibit student speech because of 'undifferentiated fear or apprehension of disturbance' or 'a mere desire to avoid the discomfort and unpleasantness that always accompany an unpopular viewpoint.'")

cases that restricted the Fourth Amendment rights of public school students, the Court noted that “detering drug use by schoolchildren is an ‘important—indeed, perhaps compelling’ interest.”⁷⁰ Chief Justice Roberts concluded that the “special characteristics of the school environment . . . [coupled with] the governmental interest in stopping student drug abuse . . . allow schools to restrict student expression that they reasonably regard as promoting illegal drug use.”⁷¹

III. DISSATISFACTION WITH THE CURRENT STANDARDS AND THE NEED FOR CLARIFICATION, REFINEMENT, AND REFORM

In *Abrams v. United States*,⁷² Justice Oliver Wendell Holmes wrote, “I think that we should be eternally vigilant against attempts to check the expression of opinions that we loathe . . . unless they so imminently threaten immediate interference with the lawful and pressing purposes of the law that an immediate check is required to save the country.”⁷³ In recent years the public school system has increasingly failed to adhere to this sentiment. School districts should

The danger here is far more serious and palpable.”) (internal citations omitted).

⁷⁰ *Id.* at 2628 (quoting *Vernonia Sch. Dist. 47J v. Acton*, 515 U.S. 646, 661 (1995). *But see id.* at 2646 (Stevens, J., dissenting) (“[I]n [the Court’s] view, the unusual importance of protecting children from the scourge of drugs supports a ban on all speech in the school environment that promotes drug use.”); *Ponce v. Socorro Indep. Sch. Dist.*, 508 F.3d. 765, 769 (5th Cir. 2007).

[T]he Court did not provide a detailed account of how the particular harms of a given activity add up to an interest sufficiently compelling to forego *Tinker* analysis. As a result of this ambiguity, speech advocating an activity entailing arguably marginal harms may be included within the circle of the majority’s rule. Political speech in the school setting, the important constitutional value *Tinker* sought to protect, could thereby be compromised by overly-anxious administrators.

Id.

⁷¹ *Morse*, 127 S. Ct. at 2629 (quoting *Tinker*, 393 U.S. at 506).

⁷² 250 U.S. 616 (1919).

⁷³ *Id.* at 630 (Holmes, J., dissenting).

not impulsively censor the speech of their students unless the speech is likely to cause a substantial disruption and suppression is necessary to maintain order within the school. The current jurisprudence comprising student speech leaves students, while in school, stripped of rights deemed at one point to be sacrosanct to the people of this nation. These standards are successful at suppressing alternate views on a topic simply because they are disfavored.⁷⁴ The deferential standards which have been implemented by the Supreme Court in its recent decisions discourage debate and the dissemination of ideas, instead promoting orthodoxy. The United States is run democratically and school systems that purportedly aim to teach the future of this society and inculcate students are charged with the duty of adhering to the Constitution. This mission is not accomplished if students decline to express a particular point of view on a topic due to fear of being punished.

A. Justice Black's Dissent in *Tinker* Has Become the Prevailing Standard

Dissenting in *Tinker*, Justice Black argued the Court's holding transferred the authority to control students from school officials to the Supreme Court.⁷⁵ His dissent resonated with the idea that the Court should defer to the determinations of educational institutions thereby minimizing judicial oversight and supervision.⁷⁶ Justice Black predicated his reasoning on the notion that students do not re-

⁷⁴ See, e.g., *Morse*, 127 S. Ct. 2618.

⁷⁵ *Tinker*, 393 U.S. at 515 (Black, J., dissenting).

⁷⁶ *Id.* at 523-24.

tain First Amendment rights while on school premises.⁷⁷ Justice Black also held the belief that “public schools . . . are operated to give students an opportunity to learn, not to talk politics by actual speech, or by ‘symbolic’ speech.”⁷⁸ He compared schools to legislatures, suggesting the majority resurrected the superannuated reasonableness evaluation prevalent in the era of *Lochner v. New York*⁷⁹ where the Court declined to defer to the judgment of the legislature and overturned laws it found to be imprudent.⁸⁰ Expressing his antipathy with the outcome of *Tinker*, Justice Black stated that the majority’s holding “surrender[s] control of the American public school system to public school students.”⁸¹

The two diametrically opposed views concerning students’ First Amendment rights are best exemplified in the majority and dissenting opinions of *Tinker*.⁸² Justice Black’s dissent, when contrasted with the majority opinion, makes clear that the entire debate pertaining to student speech concerns the amount of deference granted to school officials, and the level of scrutiny applied by courts when reviewing the constitutionality of school regulations.⁸³

⁷⁷ *Id.* at 521.

⁷⁸ *Id.* at 523-24.

⁷⁹ 198 U.S. 45 (1905).

⁸⁰ *Tinker*, 393 U.S. at 518-22 (Black, J., dissenting).

⁸¹ *Id.* at 526.

⁸² See *Tinker*, 393 U.S. 503; see also *Guiles v. Marineau*, 461 F.3d 320, 331 (2d Cir. 2006) (“*Tinker* established a protective standard for student speech under which it cannot be suppressed based on its content, but only because it is substantially disruptive.”); Chemerinsky, *supra* note 15, at 530 (referring to the majority opinion in *Tinker* as the “speech protective model,” and the dissenting opinion as the “judicial deference model”).

⁸³ See *Tinker*, 393 U.S. 503; see also Chemerinsky, *supra* note 15, at 529 (“The majority’s approach emphasizes the importance of student speech, the limits on school authority, and the need for judicial review. The dissent by Justice Hugo Black conveys a very different view, stressing the need for judicial deference to the authority and expertise of school offi-

Over a period spanning forty years, the Court has detracted from Justice Fortas's majority opinion in *Tinker*, adhering instead to Justice Black's dissent which accorded a great deal of deference to school officials and is synonymous with a rational basis standard.⁸⁴ This is evinced by the Supreme Court's decisions in *Fraser*, *Kuhlmeier*, and *Morse*, which represent a gradual departure from the holding of *Tinker*.⁸⁵ All three of these cases are devoid of the central principles propounded by the *Tinker* Court.⁸⁶ These principles include "the importance of protecting students' free speech rights, the need for proof of significant disruption of school activities, and the role of the judiciary in monitoring schools' decisions to ensure compliance with the Constitution."⁸⁷ Lending further support to this notion is the fact that the Court, in subsequent cases, has relied upon, and even cited to Justice Black's dissent when providing the rationale for its holdings.⁸⁸

Justice Black's dissent disregards the notion that schools are meant to be the marketplaces of ideas and offends the spirit of the First Amendment.⁸⁹ In order to properly inculcate students, school officials must advocate free flowing dissemination of ideas that are both officially approved and disfavored. While surely

cials.").

⁸⁴ See Chemerinsky, *supra* note 15, at 534 ("Reasonableness . . . connotes the rational basis test and tremendous deference to the government. Justice Black based this on the need for deferring to the authority of school officials.").

⁸⁵ See *id.* at 530 ("The decisions over the past thirty years are far closer to Justice Black's dissent in *Tinker* than they are to Justice Fortas's majority opinion.").

⁸⁶ See *id.* at 539, 545.

⁸⁷ *Id.* at 539.

⁸⁸ See *Fraser*, 478 U.S. at 686 (quoting *Tinker*, 393 U.S. at 526 (Black, J., dissenting)).

⁸⁹ See *Tinker*, 393 U.S. at 512.

“[u]ncontrolled and uncontrollable liberty is an enemy to domestic peace,”⁹⁰ “strangl[ing] the free mind at its source” refutes the very essence of the First Amendment.⁹¹ The majority opinion in *Tinker* captures and heeds both of these concerns, whereas, the dissenting opinion only addresses the former. Although Justice Black’s dissent has been characterized by some as being prophetic, it has only contributed to the denigration of speech the First Amendment was designed to protect.⁹² The Supreme Court has embarked on a slippery slope, and if student-freedom-of-speech cases continue in this direction, student rights will be left at the schoolhouse gate. The *Tinker* Court aimed to prevent schools from becoming “enclaves of totalitarianism” and students from becoming “closed-circuit recipients of only that which the State chooses to communicate.”⁹³ However, despite the *Tinker* Court’s efforts, the reality appears that it is only a matter of time before students are wearing identical clothes, thinking the same thoughts, and speaking only ideas that are officially approved. The implications of these decisions are disconcerting and frightening.

B. *Tinker* Provided the Appropriate Balance

The standard set forth by the *Tinker* Court to determine whether students’ First Amendment rights were violated, provided that “where there is no finding and no showing that engaging in the forbidden conduct would ‘materially and substantially interfere with the requirements of appropriate discipline in the operation of the

⁹⁰ *Id.* at 524 (Black, J., dissenting).

⁹¹ *Id.* at 507 (majority opinion).

⁹² *See Morse*, 127 S. Ct. at 2636 (Thomas, J., concurring).

⁹³ *Tinker*, 393 U.S. at 511.

school,' the prohibition cannot be sustained."⁹⁴ The standard asserted by the Court appears to be analogous to intermediate scrutiny used for equal protection analysis. The language used by the Court, primarily the words "materially" and "substantially," denote the disruption must be significant.⁹⁵ The *Tinker* Court most likely reasoned that a rational relation standard accorded too much deference to school officials, whereas strict scrutiny would provide students with too much leeway, thereby enabling them to control the school. *Tinker's* mid-tier intermediate scrutiny, however, struck the proper balance. The "material and substantial disruption" standard is pliable and capable of encompassing all forms of student-speech had the Supreme Court defined the parameters of what was meant by "material" and "substantial" instead of leaving the schools and lower courts to inconsistently interpret the meaning.⁹⁶

Tinker provides a flexible, well-reasoned standard that achieves the appropriate balance by allowing students to exercise their right to freedom of speech and schools to maintain order.⁹⁷

⁹⁴ *Id.* at 509 (citing *Burnside*, 363 F.2d at 749).

⁹⁵ *See id.* at 509.

⁹⁶ *Guiles*, 461 F.3d at 326.

Tinker [is not] entirely clear as to what constitutes "substantial disorder" or "substantial disruption" of or "material interference" with school activities. The opinion alludes to "threats [and] acts of violence on school premises," but does not otherwise explain what might qualify as "materially and substantially disrupt[ing] the work and discipline of the school."

Id. (internal citations omitted). *See also* Chemerinsky, *supra* note 15, at 529 ("Unlike the Supreme Court, lower federal courts have not followed a consistent pattern over the last thirty years. Some cases have been remarkably protective of student speech, while others have been highly deferential to schools regulating [student] expression.").

⁹⁷ *See Morse*, 127 S. Ct. at 2635-36 (Thomas, J., concurring) (explaining that *Tinker* created a pliable standard); *see also* Chemerinsky, *supra* note 15, at 545-46 (explaining that the majority opinion in *Tinker* was successful in achieving a balance that provided students with

Therefore, it is plausible that *Fraser*, *Kuhlmeier*, and *Morse* are unnecessary additions to First Amendment jurisprudence and could have been decided under the framework of *Tinker*. Upon a thorough reading of *Fraser*, *Kuhlmeier*, and *Morse*, it becomes evident that the Court's underlying motive was to distance itself from the standard set forth in *Tinker*.⁹⁸ Instead of creating exceptions to *Tinker*, the Court should have used *Fraser* and *Kuhlmeier* to clarify First Amendment jurisprudence by defining and reaffirming the standard set forth in *Tinker*. For example, the Court in *Fraser* could have held that "offensive" speech delivered at a school assembly constitutes a "material and substantial disruption." The Court in *Kuhlmeier* could have held that speech which can reasonably be regarded as school-sponsored, when disseminated, constitutes a "material and substantial disruption." Had the Supreme Court formulated the opinions of *Fraser* and *Kuhlmeier*, respectively, in this manner, it would in essence have molded and defined the parameters of what constitutes a "substantial and material disruption."⁹⁹ Not only would this have avoided the creation of miscellaneous and incongruent exceptions, but it would have provided for a more consistent and reliable interpretation of *Tinker's* holding.

the ability to exercise their First Amendment rights and school officials' the ability to restrict those rights).

⁹⁸ See *Kuhlmeier*, 484 U.S. at 272-73 ("[W]e conclude that the standard articulated in *Tinker* for determining when a school may punish student expression need not also be the standard for determining when a school may refuse to lend its name and resources to the dissemination of student expression."); *Fraser*, 478 U.S. at 681 ("The undoubted freedom to advocate unpopular and controversial views in schools and classrooms must be balanced against the society's countervailing interest in teaching students the boundaries of socially appropriate behavior.").

⁹⁹ See *Guiles*, 461 F.3d at 326 ("The [*Tinker*] opinion alludes to 'threats [and] acts of violence on school premises,' but does not otherwise explain what might qualify as 'materially and substantially disrupt[ing] the work and discipline of the school.'").

Thirty-eight years later in *Morse*, it is interesting to observe the increasing amount of deference accorded to school officials resulting from the Supreme Court's furtive alteration of the *Tinker* standard.¹⁰⁰ When *Tinker* was decided, the standard appeared to be somewhat analogous to intermediate scrutiny. However in *Morse*, the Court altered its previous interpretations stating, "*Tinker* held that student expression may not be suppressed unless school officials *reasonably* conclude that it will 'materially and substantially disrupt the work and discipline of the school.'"¹⁰¹ Appearing in the language is the word "reasonably," implying a rational basis standard.¹⁰² This means the school or school official simply needs to establish a reasonable belief the conduct in question will cause a disruption to suppress it. This rational basis form of deference is suitable when dealing with economic rights of the sort involved in a Due Process or Equal Protection challenge. However, the vast deference accorded to school officials is improper when fundamental constitutional rights are at stake.¹⁰³ Deference of this magnitude inevitably leads to abuse.¹⁰⁴ It is the job of the courts, not the schools, to interpret the

¹⁰⁰ See *Morse*, 127 S. Ct. at 2626.

¹⁰¹ *Id.* (quoting *Tinker*, 393 U.S. at 513) (emphasis added).

¹⁰² See *id.*

¹⁰³ See *Fraser*, 478 U.S. at 690 (Marshall, J., dissenting) ("I recognize that the school administration must be given wide latitude to determine what forms of conduct are inconsistent with the school's educational mission; nevertheless, where speech is involved, we may not unquestioningly accept a teacher's or administrator's assertion that certain pure speech interfered with education.").

¹⁰⁴ See Chemerinsky, *supra* note 15, at 546.

School officials—like all government officials—often will want to suppress or punish speech because it makes them feel uncomfortable, is critical of them, or just because they do not like it. The judiciary has a crucial role in making sure that this is not the basis for censorship or punishment of speech.

Constitution. The deference the Court has accorded to the school has essentially eliminated judicial review since the Court will defer to the “reasonable judgment” of the school officials.¹⁰⁵

The Court’s increasing deference to school districts and school officials is evinced by the decisions in *Fraser*, *Kuhlmeier*, and *Morse*. The rationale for the abundant amount of deference is that the Supreme Court is not suited to make decisions concerning institutions with which it has little knowledge.¹⁰⁶ This argument, however, is unavailing since “judges always adjudicate cases in fields alien to them, including ‘accounting partnerships; administrative law judge-ships; law enforcement; engineering; computer programming; and hard sciences such as chemistry.’”¹⁰⁷ The reason why schools have won every case to reach the Supreme Court since *Tinker* can be easily explained by the deferential standards which have been applied to student speech cases.¹⁰⁸ It appears as though school officials may advance any reason for curtailing student speech, so long as it is reasonable. Provided this reasonableness requirement is met, the Court will defer to the school official’s judgment, reasoning they are in the best position to make such a determination, not the Justices of the Court

Id.

¹⁰⁵ See *Morse*, 127 S. Ct. at 2647 (Stevens, J., dissenting).

¹⁰⁶ See *id.* at 2636 (Thomas, J., concurring) (“Local school boards, not the courts, should determine what pedagogical interests are ‘legitimate’ and what rules ‘reasonably relat[e]’ to those interests.”). See also Scott A. Moss, *Students and Workers and Prisoners—Oh My! A Cautionary Note About Excessive Institutional Tailoring of First Amendment Doctrine*, 54 UCLA L. REV. 1635, 1658 (2007).

¹⁰⁷ Moss, *supra* note 106, at 1666-67 (citing Scott A. Moss, *Against “Academic Deference”*: *How Recent Developments in Employment Discrimination Law Undercut an Already Dubious Doctrine*, 27 BERKELEY J. EMP. & LAB. L. 1, 6-7 (2006)).

¹⁰⁸ See Chemerinsky, *supra* note 15, at 527-28 (“Over the three decades of the Burger and Rehnquist Courts, there have been virtually no decisions protecting rights of students in schools.”).

who are granted life-long terms.

The Court in *Morse* was so reluctant to find in favor of the student that it preferred to create another exception to the standard pronounced in *Tinker* instead of deciding the case under *Tinker's* framework.¹⁰⁹ Had the Court analyzed Frederick's banner under *Tinker*, the case would have had a very different outcome since the speech at issue did not cause a "material or substantial disruption." Cognizant of this, the Supreme Court, seeking to defer to the determination made by school authorities, created another exception to *Tinker*, which permitted school officials to circumscribe speech that could "reasonably be regarded as encouraging illegal drug use."¹¹⁰ Schools should not be granted unbridled authority to censor speech, especially speech that strikes at the core of what the First Amendment was implemented to protect.

It appears as though it is only a matter of time before the Court constrains the holding of *Tinker* even further, making *Tinker* the exception instead of the rule to be applied in student speech cases. The Supreme Court may accomplish this goal in one of several ways: (1) extending *Fraser's* application to include speech that offends a school's educational mission;¹¹¹ (2) holding that *Tinker* applies only to speech that is political;¹¹² or (3) creating additional exceptions to

¹⁰⁹ *Morse*, 127 S. Ct. at 2622 ("[W]e hold that schools may take steps to safeguard those entrusted to their care from speech that can reasonably be regarded as encouraging illegal drug use.").

¹¹⁰ *Id.*

¹¹¹ See *Boroff v. Van Wert City Bd. of Educ.*, 220 F.3d 465, 470 (6th Cir. 2000) (holding that school officials may censor speech they deem to contravene the school's educational mission).

¹¹² See *Blau v. Fort Thomas Pub. Sch. Dist.*, 401 F.3d 381, 391-93 (6th Cir. 2005); *Canady v. Bossier Parish Sch. Bd.*, 240 F.3d 437, 443 (5th Cir. 2001); and *Bar-Navon v. Sch.*

Tinker, thereby eviscerating the rule altogether.¹¹³

IV. THE DANGERS INHERENT IN *MORSE V. FREDERICK*

A. Disciplining Students for Activities Occurring Off-Campus

The law governing public forums is well-settled. However, in *Morse* the Supreme Court determined that standards governing student speech trump those governing public forums.¹¹⁴ Had this conclusion not been reached the Court would have sided with Frederick, since he was on a public street—which has been defined as a “quintessential public forum”—when he unfurled his banner.¹¹⁵ The Court circumvents the rules pertaining to traditional public forums by labeling the event as a school-sanctioned activity.¹¹⁶ Concurring in the judgment of *Fraser*, Justice Brennan stated, “[i]f [the student] had given the same speech outside of the school environment, he could not have been penalized simply because government officials considered his language to be inappropriate.”¹¹⁷ The same reasoning should apply in *Morse*, since technically Frederick was not on school grounds and was far removed from the school environment. However, in an effort to suppress the silent, passive speech at issue in

Bd. of Brevard County, No. 6:06-cv-1434-Orl-19KRS (M.D. Fla. Nov. 5, 2007), 2007 WL 3284322, at *7 for a discussion of how *Tinker*'s protection extends only to viewpoint discrimination.

¹¹³ See *Morse*, 127 S. Ct. at 2622, 2629; *Kuhlmeier*, 484 U.S. at 271; *Fraser*, 478 U.S. at 685.

¹¹⁴ See *Morse*, 127 S. Ct. at 2624; *Perry Educ. Ass'n v. Perry Local Educators' Ass'n*, 460 U.S. 37, 45 (1983).

¹¹⁵ See *Hague v. Comm. for Indus. Org.*, 307 U.S. 496, 515 (1939).

¹¹⁶ *Morse*, 127 S. Ct. at 2624.

¹¹⁷ *Fraser*, 478 U.S. at 688 (Brennan, J., concurring).

Morse, the school district extended the boundaries through which it may permissibly discipline students to include off-campus, albeit school-sanctioned activities, taking place on a public street.¹¹⁸ Although there have been numerous cases addressing student speech that occurs off-campus which is subsequently brought on campus, there is scant authority on the issue of what constitutes a school-sanctioned event.¹¹⁹ The fact that the Olympic Torch Relay occurred off-campus is incontrovertible. However, instead of defining the permissible boundaries of school discipline, the Supreme Court circuitously avoided the issue by labeling the event as a school-sanctioned event, and disposed of the case by creating an additional exception to *Tinker*.¹²⁰

B. *Porter v. Ascension Parish School Board*

There has been much debate over how far the school's disciplinary authority extends, which is why it has been argued that the Supreme Court should have used *Morse* as an opportunity to clarify the conflicting case law.¹²¹ Since the issue has never been addressed by the Supreme Court, *Porter v. Ascension Parish School Board*¹²² continues to be the benchmark case that discusses the various stan-

¹¹⁸ *Morse*, 127 S. Ct. at 2624.

¹¹⁹ See, e.g., *LaVine v. Blaine Sch. Dist.*, 257 F.3d 981 (9th Cir. 2001); *Boucher v. Sch. Bd. of Sch. Dist. of Greenfield*, 134 F.3d 821 (7th Cir. 1998); *Thomas v. Bd. of Educ., Granville Cent. Sch. Dist.*, 607 F.2d 1043 (2d Cir. 1979); *Sullivan v. Houston Indep. Sch. Dist.*, 475 F.2d 1071 (5th Cir. 1973).

¹²⁰ *Morse*, 127 S. Ct. at 2624, 2629.

¹²¹ *Porter v. Ascension Parish Sch. Bd.*, 393 F.3d 608, 619-20 (5th Cir. 2004) ("Frustrated by . . . inconsistencies, commentators have begun calling for courts to more clearly delineate the boundary line between off-campus speech entitled to greater First Amendment protection, and on-campus speech subject to greater regulation.")

¹²² *Id.* at 614-621.

dards utilized to determine whether a student may be disciplined for conduct that takes place off-campus.¹²³ The Supreme Court in *Morse* even cited to *Porter* after concluding the Olympic Torch Relay was a school-sanctioned activity, stating “[t]here is some uncertainty at the outer boundaries as to when courts should apply school-speech precedents.”¹²⁴

In *Porter*, a student drew a picture in a sketchpad of his school under attack by various armaments coupled with vulgarities and racial epithets.¹²⁵ Additionally, the sketch made references to the student’s high school principal using derogatory remarks and depicted a brick being thrown at him.¹²⁶ The sketch—which was created by the student while he was at home—was kept in a closet until two years later when his younger brother unwittingly brought the sketchpad to school.¹²⁷ While riding the bus home, the drawing was brought to the attention of the bus driver who confiscated the sketchpad and alerted school authorities of the incident.¹²⁸ The student who sketched the drawing two years prior was removed from school, recommended for expulsion, and arrested for terrorizing the school.¹²⁹ Waiving his right to a high school disciplinary hearing, the student enrolled in an alternative school program within the same district.¹³⁰ Despite being given the option to re-enroll at his former high school

¹²³ *Id.*

¹²⁴ *Morse*, 127 S. Ct. at 2624.

¹²⁵ *Porter*, 393 F.3d at 611.

¹²⁶ *Id.*

¹²⁷ *Id.*

¹²⁸ *Id.*

¹²⁹ *Id.* at 612.

¹³⁰ *Porter*, 393 F.3d at 612.

the following academic year, the student decided to drop out.¹³¹

Subsequently, the student's mother filed suit in district court.¹³² Summary judgment was entered on behalf of the school board after the court found the sketch did not warrant First Amendment protection.¹³³ On appeal, the Fifth Circuit concluded the sketch did not qualify as student speech.¹³⁴ The court reasoned that the "drawing was completed in [the student's] home, stored for two years, and never intended by him to be brought to campus. He took no action that would increase the chances that his drawing would find its way to school."¹³⁵ The court entered into a detailed discussion regarding the standard to be used when off-campus speech ends up on-campus.¹³⁶ The Fifth Circuit took note of the divisiveness among the courts that have dealt with this issue; and mentioned how some courts use *Tinker's* substantial disruption analysis, while other courts categorically provide First Amendment protection so long as the speaker did not facilitate the speech's dissemination on campus.¹³⁷ Still, other courts use a variety or combination of student-speech standards.¹³⁸

To dispose of the issue, the court utilized a unique bifurcated standard.¹³⁹ First, the court analyzed whether the drawing could be

¹³¹ *Id.*

¹³² *Id.*

¹³³ *Id.* at 612-13.

¹³⁴ *Id.* at 615 ("Given the unique facts of the present case, we decline to find that [the student's] drawing constitutes student speech on school premises.").

¹³⁵ *Porter*, 393 F.3d at 615.

¹³⁶ *Id.* at 615-20.

¹³⁷ *Id.* at 619.

¹³⁸ *Id.*

¹³⁹ *Id.* at 616-18, 620. The Court first analyzed whether the sketch constituted a true threat and then considered whether the sketch was directed at the campus. *Id.*

characterized as a “true threat.”¹⁴⁰ The court explained the government is authorized under the First Amendment to ban speech deemed “a true threat of violence.”¹⁴¹ “Speech is a ‘true threat’ and therefore, unprotected if an objectively reasonable person would interpret the speech as a ‘serious expression of an intent to cause a present or future harm.’ ”¹⁴² The speaker forfeits First Amendment protection when the speech is “intentionally or knowingly *communicated* to either the object of the threat or a third person.”¹⁴³ Finding the sketch did not meet the criteria of a true threat, the court then analyzed whether the speech was “directed at the campus.”¹⁴⁴ Considering numerous factors, the court held that since the student’s drawing was created off-campus, shown only to his own family, kept in a closet for two years, and was not intentionally brought by him to his high school or disseminated in a way that would cause it to reach his high school, the drawing was entitled to First Amendment protection.¹⁴⁵

It is questionable whether the Supreme Court in *Morse* applied the correct or most appropriate standard when determining whether Frederick’s banner was entitled to protection under the First Amendment. Perhaps the Supreme Court should have applied the reasonable foreseeability standard utilized in *Porter* to determine whether Frederick’s speech was directed at the campus. Considering the irreconcilable case law addressing the extent to which a school’s

¹⁴⁰ *Porter*, 393 F.3d at 616-18.

¹⁴¹ *Id.* at 616.

¹⁴² *Id.* at n.25 (quoting *Doe v. Pulaski County Special Sch. Dist.*, 306 F.3d 616, 622 (8th Cir. 2002)).

¹⁴³ *Id.* at n.26 (citing *Virginia v. Black*, 538 U.S. 343, 359 (2003)) (emphasis added).

¹⁴⁴ *Id.* at 618, 620.

¹⁴⁵ *Porter*, 393 F.3d at 620.

authority extends beyond campus, it is no surprise the Supreme Court decided to avoid the issue of off-campus speech altogether. The Supreme Court chose to dispose of *Morse* with administrative ease and efficiency by creating a new exception, rather than clarify an unsettled area of law. Furthermore, the Court was insistent upon deferring to the determination of the principal and proscribing the speech on Frederick's banner. The only way the Court could reach this desired result was to create a new exception to *Tinker*. It is axiomatic that if *Tinker's* standard was applied to the facts of *Morse*, Frederick would have prevailed since his banner did not cause a material and substantial disruption. The Court in *Tinker* unequivocally opined that students' First Amendment rights extend beyond the classroom.¹⁴⁶ Moreover, the Olympic Torch Relay was an extracurricular activity and student attendance was voluntary. Regulating and censoring certain forms of speech in a school setting where student attendance is mandatory is understandable and necessary to maintain order. However, banning non-disruptive speech made by an adult, at a public event, on a public street, works a manifest injustice on the First Amendment.

The danger inherent in *Morse* is that it is only a matter of time before the dicta inherent in the Court's analysis is used to suppress speech made off-campus. *Morse* advances the proposition that not only may schools regulate speech which can "reasonably be regarded as encouraging illegal drug use," but that schools may do so regardless of where the speech takes place. The decision in *Morse* will un-

¹⁴⁶ *Tinker*, 393 U.S. at 512.

doubtedly lead school authorities to place additional restrictions on student speech even for activities occurring off campus; it may be relied on as supporting authority.¹⁴⁷

C. *Wisniewski v. Board of Education of the Weedsport Central School District*

*Wisniewski v. Board of Education of the Weedsport Central School District*¹⁴⁸ reveals the dangers of extending student speech precedents to include conduct that takes place off-campus. In *Wisniewski*, a student was suspended for an entire semester as a result of creating a “buddy icon” on America Online’s instant messaging program which depicted “a pistol firing a bullet at a person’s head, above which were dots representing splattered blood.”¹⁴⁹ Intending the figure in the drawing to represent his English teacher, the student wrote the words “Kill Mr. VanderMolen” underneath the image.¹⁵⁰ The “buddy icon” was created by the student and transmitted to several “buddies” on the student’s “buddy list” while he was at home on his parents’ computer.¹⁵¹ Despite the fact that the icon was intended to be a joke and the incident took place off-campus, the superintendent concluded the drawing was sufficient to constitute a threat which “was in violation of school rules and disrupted school operations by requiring special attention from school officials, replacement of the

¹⁴⁷ See Chemerinsky, *supra* note 13, at 430 (“By allowing schools to punish speech when there is no evidence of disruption or other harm, *Morse* likely will be read by school administrators and lower courts as permitting much more government regulation of student speech.”).

¹⁴⁸ 494 F.3d. 34 (2d Cir. 2007).

¹⁴⁹ *Id.* at 36.

¹⁵⁰ *Id.*

¹⁵¹ *Id.*

threatened teacher, and interviewing pupils during class time.”¹⁵²

Addressing whether the student could be disciplined for conduct that occurred off-campus, the Second Circuit looked to *Morse* for guidance.¹⁵³ The court stated that:

Since the Supreme Court in *Morse* rejected the claim that the student’s location, standing across the street from the school at a school approved event with a banner visible to most students, was not “at school,” it had no occasion to consider the circumstances under which school authorities may discipline students for off-campus activities.¹⁵⁴

Since *Morse* failed to address the issue, the Second Circuit was split regarding “whether it must be shown that it was reasonably foreseeable that [the student’s] IM icon would reach the school property or whether the undisputed fact that it did reach the school pretermits any inquiry as to this aspect of reasonable foreseeability.”¹⁵⁵ Despite being divided, the court concluded it was reasonably foreseeable the speech in question would reach the school’s premises.¹⁵⁶ Upholding the student’s suspension, the court proceeded to analyze the facts of the case under *Tinker* and found the student’s conduct caused a “substantial disruption.”¹⁵⁷ The court opined that “[t]hese consequences permit school discipline, whether or not [the student] intended his IM

¹⁵² *Id.*

¹⁵³ *Wisniewski*, 494 F.3d at 39 (“The fact that [the student’s] creation and transmission of the IM icon occurred away from school property does not necessarily insulate him from school discipline.”).

¹⁵⁴ *Id.* n.3 (citing *Morse*, 127 S. Ct. at 2623-24) (internal citations omitted).

¹⁵⁵ *Id.* at 39.

¹⁵⁶ *Id.* at 39-40.

¹⁵⁷ *Id.* at 40.

icon to be communicated to school authorities or, if communicated, to cause a substantial disruption.”¹⁵⁸

D. *Doninger v. Niehoff*

Doninger v. Niehoff,¹⁵⁹ is also illustrative of the dangers inherent in *Morse*'s holding. *Doninger* is very similar to *Wisniewski*, and actually relies upon that court's holding for support.¹⁶⁰ In *Doninger*, a student was prohibited from running in the election for Senior Class Secretary as the result of a derogatory blog entry directed at school officials which she posted on an Internet website.¹⁶¹ It is important to note that the blog entry was not composed on a school computer or during school hours, but rather was written while the student was home late in the evening.¹⁶² Subsequently, the student's mother filed suit on behalf of her daughter.¹⁶³ She alleged various constitutional violations and sought to enjoin the decision of the school officials.¹⁶⁴

Reviewing the likelihood of success of the student's First Amendment claims, the court conceded the speech occurred off-campus, thereby rendering *Fraser* inapposite to the matter at issue.¹⁶⁵ However, it circumvented this reasoning and dismissed the point by stating the speech “was purposely designed by [the student] to come

¹⁵⁸ *Wisniewski*, 494 F.3d at 40.

¹⁵⁹ 514 F. Supp. 2d 199 (D. Conn. 2007).

¹⁶⁰ *Id.* at 216-17.

¹⁶¹ *Id.* at 207-08.

¹⁶² *Id.* at 206.

¹⁶³ *Id.* at 202.

¹⁶⁴ *Doninger*, 514 F. Supp. 2d at 202.

¹⁶⁵ *Id.* at 216.

onto the campus.”¹⁶⁶ The court held that “[u]nder *Wisniewski* . . . the Court believes that [the student’s] blog entry may be considered on-campus speech for the purposes of the First Amendment.”¹⁶⁷ Although the court did not articulate which student-speech standard should govern the facts of the case, the court concluded that “*Fraser* and *Morse* teach that school officials could permissibly punish [the student] in the way that they did for her offensive speech.”¹⁶⁸

V. REMEDYING THE INCONSISTENCY AMONG THE LOWER COURTS

In order to eliminate the confusion among the lower courts deciding student-speech cases, clear and precise lines must be drawn by the Supreme Court.¹⁶⁹ First and foremost, a distinction must be made between speech that takes place on campus and speech that takes place off-campus. If the speech takes place on campus, then undoubtedly student-speech precedents should apply. However, if the speech takes place off-campus, greater protection should be accorded to the student, and the regulation should be evaluated using a more exacting form of scrutiny unless the speech qualifies as a “true threat.” The courts should implement a two-step analysis. First, the court should consider whether it is “reasonably foreseeable” that the speech in question would reach the campus. In other words, the court must determine whether the speech was directed at the campus. If

¹⁶⁶ *Id.*

¹⁶⁷ *Id.* at 217.

¹⁶⁸ *Id.*

¹⁶⁹ *Morse*, 127 S. Ct. at 2634 (Thomas, J., concurring) (explaining that student-speech jurisprudence is confusing and difficult to interpret).

the answer to the first inquiry is in the affirmative, then the court should examine the constitutionality of the regulation utilizing *Tinker*, and only uphold the regulation if the speech created a material and substantial disruption on campus.¹⁷⁰ However, if the answer to the first inquiry is in the negative, then there should be a presumption that the regulation is unconstitutional, thus placing the burden on the school district to demonstrate the regulation is narrowly tailored to effectuate a compelling pedagogical interest.¹⁷¹

Secondly, although *Fraser*, *Kuhlmeier*, and *Morse* cannot be erased from student speech jurisprudence, their application must be limited to their respective purposes as opposed to being augmented to censor more speech than was originally intended. Therefore, *Fraser* should not be read to suppress speech that offends a school's educational mission, but rather should be utilized only to censor speech that is lewd, vulgar, and obscene. *Kuhlmeier* should only be used to ban inappropriate forms of speech that can reasonably be perceived as endorsed by the school. *Morse*, which purportedly applies solely to speech advocating illegal drug use, must be interpreted narrowly to allow commentary and political or social debate on controversial issues. Lastly, *Tinker* should be interpreted broadly and treated as the "catch-all" standard that applies to all student-speech not falling under *Fraser*, *Kuhlmeier*, and *Morse*.

¹⁷⁰ See, e.g., *Wisniewski*, 494 F.3d at 39-40.

¹⁷¹ See *Thomas*, 607 F.2d at 1050-52, for the proposition that students should receive full First Amendment protection for speech taking place off-campus.

A. Inconsistent Application of *Fraser*

Despite having the opportunity to elucidate all student-speech jurisprudence in *Morse*, the Supreme Court only found it necessary to refine *Fraser*. The Supreme Court's decision in *Fraser* has been incorrectly interpreted and impermissibly expanded by numerous lower courts.¹⁷² These courts have expanded *Fraser's* application to include speech that offends the school's educational mission.¹⁷³ The danger inherent in this argument is that if speech can be suppressed simply because it is incompatible with the school's mission, then schools can manipulate their educational missions to proscribe any viewpoint with which it disagrees.¹⁷⁴ In *Morse*, the Supreme Court took note of the ambiguity present in *Fraser*.¹⁷⁵ Attempting to clarify its previous decision, the Court opined that *Fraser* "should not be read to encompass any speech that could fit under some definition of 'offensive.'" ¹⁷⁶ This pronouncement by the Supreme Court unequivocally restricts *Fraser's* application to vulgar, lewd, and indecent speech.

B. Inconsistent Application of *Tinker*

Although this Article advances the proposition that *Tinker* should be the standard applied in all student-speech cases, it must be

¹⁷² See, e.g., *Boroff*, 220 F.3d at 469-72 (holding that a T-shirt depicting an image of Marilyn Manson coupled with other anti-religious messages was offensive pursuant to *Fraser* since it contravened the school's educational and anti-drug missions).

¹⁷³ *Id.* at 470.

¹⁷⁴ See *Morse* 127 S. Ct. at 2637 (Alito, J., concurring) (discussing the dangers posed by the "educational mission" argument).

¹⁷⁵ *Id.* at 2626, 2629 (majority opinion).

¹⁷⁶ *Id.* at 2629.

noted the standard is far from perfect. The lower court decisions are inconsistent concerning the scope of *Tinker's* application. Some courts read *Tinker* narrowly and only utilize the material and substantial disruption standard when a school district engages in political viewpoint-based discrimination; whereas other courts read *Tinker* broadly, reasoning that it applies to all student speech not falling under any of the other exceptions.¹⁷⁷ In *Morse*, the Supreme Court failed to articulate which application of *Tinker* is correct. As stated previously, to achieve uniformity among the courts, *Tinker* should be interpreted as the “catch-all” standard that applies when the other exceptions are inapposite.

The standard enunciated in *Tinker* is also deficient because the Supreme Court never defined exactly what constitutes a “material and substantial disruption.” By defining this terminology, the Supreme Court could effectively provide the lower courts more guidance when rendering decisions. To determine whether speech causes a “material and substantial disruption,” the courts should implement a factor-based approach. Factors the court should look to when determining whether speech constitutes a material and substantial disruption include: (1) whether class time was disrupted as a result of the

¹⁷⁷ See *Guiles*, 461 F.3d at 326 (“It is not entirely clear whether *Tinker's* rule applies to all student speech that is not sponsored by schools, subject to the rule of *Fraser*, or whether it applies only to political speech or to political viewpoint-based discrimination.”). See also *Bar-Navon*, 2007 WL 3284322, at *5, stating:

Courts disagree . . . as to the broader question of whether the legal standard in *Tinker* is applicable more generally to all regulation of student speech and not simply speech that expresses a particularized view. In other words, the dispute involves whether there should be a distinction between school speech regulation that is viewpoint-hostile and school conduct regulation that only incidentally burdens student expression.

conduct in question; (2) whether the students' school day was altered due to the conduct; (3) how severely the students were affected by the conduct; (4) the size of the student population that was affected; and (5) the age of the students subjected to the speech.

VI. CONCLUSION

Regardless of whether *Morse* is relied upon to accord more deference to the determination of school officials, or to extend the holding of *Fraser* to include speech that offends a school's educational mission, or provide schools the authority to censor speech occurring off-campus; it is clear the holding and pronouncement in *Tinker*, that students do not "shed their constitutional rights to freedom of speech or expression at the schoolhouse gate," has been obliterated.¹⁷⁸ The notion that "[t]he vigilant protection of constitutional freedoms is nowhere more vital than in the community of American schools" has long since been discarded¹⁷⁹ Although at one point in time *Tinker* provided the overarching standard to be applied in student speech cases, in recent years it has been reduced to a narrow exception, and is now collecting dust on the Supreme Court's shelf. It appears that at present, the predominant standard is one of judicial deference. A court faced with a student freedom of speech issue will capriciously determine which category of deferential exceptions the facts of a given case fit into. Clearly, and maybe unfortunately, it has

¹⁷⁸ *Tinker*, 393 U.S. at 506; see Chemerinsky, *supra* note 15, at 546 ("Simply put, thirty[-]nine] years after *Tinker*, students do leave most of their First Amendment rights at the schoolhouse gate.").

¹⁷⁹ *Healy v. James*, 408 U.S. 169, 180 (1972) (quoting *Shelton v. Tucker*, 364 U.S. 479, 487 (1960)).

many to choose from. Additionally, it is alarming that if the Supreme Court cannot suppress the speech at issue because it fails to cause a substantial disruption and does not fall under any of the exceptions to *Tinker*, the Court will simply create another exception. This deferential approach taken by the Court in *Morse*, and other post-*Tinker* cases, is certain to continue to have a snowball effect. There is a high probability that additional exceptions will be created in the future. At one point in time, student rights were summarized by the oft-stated maxim that “the First Amendment gives a high school student the classroom right to wear *Tinker*’s armband, but not *Cohen*’s jacket [which read ‘Fuck the Draft’].”¹⁸⁰ However, considering the current status of First Amendment jurisprudence, this maxim has failed to keep pace with the times and must be altered to incorporate the numerous exceptions. Today, the First Amendment also prohibits *Fraser*’s sexually suggestive speech, publishing *Kuhlmeier*’s unedited newspaper, and unfurling *Frederick*’s controversial banner.

It appears as though the Supreme Court has implicitly ruled the First Amendment is inapplicable; it fails to protect those who have not reached the age of majority, adhering to the antediluvian notion that “children are to be seen not heard.”¹⁸¹ The Court, by diminishing the protection granted to students through the First Amendment, has completely disregarded the fact that “[s]tudents in school as well as out of school are ‘persons’ under our Constitution.”¹⁸² As Justice Stevens stated in *Morse*, “it is the expression of the minority’s

¹⁸⁰ *Fraser*, 478 U.S. at 682 (quoting *Thomas*, 607 F.2d at 1057).

¹⁸¹ See *Tinker*, 393 U.S. at 522 (Black, J., dissenting).

¹⁸² *Id.* at 511.

viewpoint that most demands the protection of the First Amendment.”¹⁸³ Although speech that does fall within the majority’s scope may cause trepidation, “our Constitution says we must take this risk, and our history says that it is this sort of hazardous freedom . . . that is the basis of our national strength and of the independence and vigor of Americans who grow up and live in this relatively permissive, often disputatious, society.”¹⁸⁴

¹⁸³ *Morse*, 127 S. Ct. at 2651 (Stevens, J., dissenting).

¹⁸⁴ *Tinker*, 393 U.S. at 508-09 (internal citations omitted).